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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 1163

ALLAN L. ROBBINS
Warden, Maine State Prison
PETITIONER

v.

CLIFFORD G. SMALL, III
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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Allan L. Robbins prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on January 31, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in the Record Appendix hereto, *infra*, p. 25, is not yet reported.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on January 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254, (1).

QUESTIONS PRESENTED

1. Whether the court below erred in deciding that even with proper instructions a jury could not dispel prejudice to the accused caused by a witness's plural refusals to testify on grounds of self-incrimination?

2. Whether the court below erred in deciding that *Douglas v. Alabama*, 380 U.S. 415 constitutes a controlling precedent in the instant case?

3. Whether the court below erred in deciding that the petitioner's conviction was obtained in violation of the petitioner's rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Confrontation Clause of the Sixth Amendment to the United States Constitution.

STATEMENT

This case originated in the District Court on the respondent's petition for the Writ of Habeas Corpus prosecuted after the Maine Supreme Court had sustained his conviction in *State v. Small*, ... Me. ...., 219 A. 2d 263 (April 22, 1966). The District Court Judge vacated the State Court conviction and remanded the case to the State Trial Court to afford the petitioner a new trial. The Circuit Court of Appeals has affirmed the District Court decision.

At Small's trial in the State Court, the State called one Richard Alfred Palmer as a witness. At that time, Palmer was an inmate at the Maine State Prison. Palmer was not involved with the crime charged against Small. The State's attorney inquired of Palmer re the latter's name, age, and residence, and Palmer answered these initial questions. Next, the County Attorney asked a series of questions which Palmer responded to as follows: "I refuse to answer on the grounds it might incriminate me." The first question which he refused to answer was whether he lived alone at 108 High Street in Portland, Maine. The next four questions to which Palmer interposed a Fifth Amendment privilege, were as follows:

Q. "Now, on June 4th, 1964, did you have occasion to be in the Portland Police Station?"

Q. "On that day, did you make a statement to the Portland Police?"

Q. "Was this statement that I ask you about in connection with a case against Clifford J. (sic) Small, III?"

Q. "On the night or the early morning hours of the, of June 4th, 1964, was Clifford J. (sic) Small, III, in your car?"

Palmer gave a different response to the next three questions put to him by the State's attorney, i.e., did he know Clifford G. Small, III; did he see him in the court-

room; and would he point him out to the jury. Palmer stated that he knew Small, that he saw him in the courtroom at that moment and he pointed him out to the jury. Thereafter, the witness refused to answer three more questions and interposed the incrimination ground. The questions were:

Q. "Did you leave Clifford Small off at the corner of State and Congress Streets?"

Q. "Did you see him later at the Forest City Diner?"

Q. "Were you at the Forest City Diner about 1:30, 2:00 on the morning of June 4, 1964?"

The County Attorney then asked this question:

Q. "Did Clifford Small come into the Forest City Diner after you left him off uptown?"

It was at this point that Small's attorney entered his first objection to the questioning of the witness Palmer by the County Attorney. Small's attorney objected for the reason that the State was "using leading questions and getting to the jury what he probably may have hoped this man's testimony would be." The objection was overruled by the Trial Court Judge; and the State continued the examination with the following questions, each of which the witness refused to answer on self-incrimination grounds (except where noted):

Q. "I ask you, down in the Forest City Diner shortly after you left Mr. Small off uptown, did he give you some money?"

(Petitioner's objection was overruled. The witness made no response. The question was reworded as below.)

Q. "Did he give you some money down there?"

Q. "Did you see any policeman down in the Forest City Diner?"

Q. "Did you tell Mr. Small to go to the men's room

down there that night because there were policemen outside?"

Q. "Did Mr. Small tell you he got $80 or $40?"

(Question withdrawn following petitioner's objection.)

Q. "While you were down at the Forest City Diner with Mr. Small at about 2:15 in the morning of June 4, 1964 didn't he say to you he smashed a guy?"

(Petitioner's objection overruled.)

Q. "Now, after you got back down in the Forest City Diner, did you notice anything wrong with Mr. Small's hand?"

(Petitioner's objection overruled.)

Q. "Which one of you went over to the cashier and had a bill broken, down at the Forest City Diner?"

(Question withdrawn following petitioner's objection.)

At this point the questioning by the State ceased, and Small's attorney requested the Trial Judge to instruct the jury to disregard and not to consider as evidence against the petitioner those questions which were asked by the State, which the witness had refused to answer. The Court refused the requested instruction at that time, saying that the circumstances of the witness would be described to the jury later. The State and the defense then rested. The attorneys for both the State and the defendant went into the judge's chambers where Small's attorney presented a motion for a mistrial because the County Attorney's questioning of Palmer was harmful and prejudicial to the defendant and it could not be cured by an instruction to the jury. The motion was denied. In the course of his charge to the jury, the Presiding Justice gave the

following instruction relative to Palmer and his refusal to testify:

> "You will not, I instruct you with as much emphasis as I am capable, undertake to speculate upon which might have been his answers had he chose not to invoke the constitutionally guaranteed privilege against self-incrimination. The fact of the matter is, he did invoke such constitutional right; in doing so he was clearly within his rights. That is all there is to his testimony. You will not undertake to draw any inferences from anything he didn't say, because I instruct you, your conclusions must be based entirely upon legally admitted evidence, and he gave no evidence beyond stating his name, where he was, and where he once resided and a particular person whom he knew. That is all he said. He gave no other evidence. The questions which were asked him were asked in a form I ruled proper because of rules of law with which I need not enter into in a discussion on this case. You will not undertake to draw any inferences from the questions. The fact of the matter is that the questions were not answered, so disabuse your minds of any inferences which you could speculate might have resulted had the witness chosen not to invoke the provisions of the Constitution guaranteeing against compulsory self-incrimination."

In his appeal to the Supreme Judicial Court of Maine, Small complained of the Trial Judge's refusal to grant the motion for a mistrial, and of other matters which are not here material. In sustaining the Trial Court Judge's ruling, the Law Court distinguished the instant case from *Douglas v. State of Alabama*, 380 U.S. 415, 85 S.Ct. 1074, saying that in *Douglas v. Alabama*, supra, the prosecutor utilized tactics which were not present in the instant case. Furthermore, the Law Court noted that no "curative charge" was given by the Trial Judge in *Douglas*, whereas such a "curative charge" was given in the instant case. The majority opinion (one Justice dissented) concluded by

stating that the ordering of a mistrial was a matter of discretion for the Presiding Justice, and that exceptions would lie only to a clear abuse of that discretion. The Court noted that this particular objection did not raise a constitutional question.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is directly in conflict with the decision of the Second Circuit Court of Appeals in *United States v. Reincke*, 354 F. 2d 418 (1965), cert. den. 384 U.S. 993 (1966). This conflict appears to be conceded by the court below in its comment that: "We are frank to say that we cannot accept either the reasoning or the result reached by the court in *Reincke*." (Appendix, p. 30)

Moreover, the decision below conflicts with *Reincke* as to the import of this Court's decision in *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278. The *Reincke* case interprets *Namet* as indicating that a cautionary instruction to the jury can cure prejudice that might have resulted from an examination of a witness who repeatedly invoked the reference testimonial privilege. With this, the court below does not agree.

> "We cannot agree with the court in *Reincke* that *Douglas v. Alabama* is also distinguishable on the ground that *Namet* 'appears to indicate that any prejudice that might result from such an examination can be cured by cautionary instructions to the jury.'" (Appendix, p. 31)

The court below has affirmed the district court's reversal of the decision rendered by the highest appellate court of the State of Maine. In doing so, the Circuit Court has cast aside the principle expressed by *Reincke*, i.e., that any prejudice which might have resulted from the prosecution's examination of one of its witnesses can be cured by proper jury instruction; and the Circuit Court has determined that the *Reincke* decision is incorrect in its application of *Namet*. Be-

cause the reversal of the State Appellate Court's decision created the reference conflict, it should be reviewed by this Court.

2. Clearly, the questions presented are of importance in the administration of justice in a criminal case. The judge's instruction to the jury was faultless in its admonition that no inferences were to be drawn by the jury from the state's witness's invocation of the Fifth Amendment privilege against self-incrimination. The court below called the instruction "forceful". (Appendix, p. 30) Even so, the Circuit Court determined that the charge could not be of significance to the jury.

Proper cautionary instructions to a jury in a criminal case have significance. Limiting instructions can purge the erroneous introduction of evidence or even limit evidence to its proper purpose. *Spencer v. Texas*, ... U.S. ...., 87 S. Ct. ...., 17 L. Ed. 2d 606, (January 23, 1967). Cases where proper instructions have purged like objectionable inferences are *United States v. Gernie*, 252 F. 2d 664, cert. den. 356 U.S. 968; *United States v. Maloney*, 262 F. 2d 535; *Weinbaum v. United States*, 184 F. 2d 330; and *United States v. Reincke*, supra.

3. The decision of the court below is believed to be erroneous; and the conflicting decision of the Second Circuit Court of Appeals in *United States v. Reincke* correct. The court below is in error in maintaining that *Douglas v. Alabama* is controlling in the instant case.

The facts in *Douglas* are distinguishable from the facts of the instant case. The prosecution, in *Douglas*, directed its efforts towards the emphasis of the witness's confession in its examination in chief of the witness, i.e., the witness's statement was marked for identification before the jury; police officers identified the statement in the jury's presence; the prosecutor read lengthy portions of the witness's statement (verbatim) to the witness and then asked the witness

whether he had made that statement (thereby placing the entire contents of the statement before the jury); and the unwilling witness was even asked if the signature on the statement was his signature. No such prosecutorial emphasis was given the witness's statement in the present case. No reading of the statement whatsoever was made by the prosecutor in the present case; and neither did the prosecutor ask the witness if his signature appeared on the document. Furthermore, the trial judge in the instant case gave a "curative charge" to the jury, which charge is recognized as being both complete and forceful. In *Douglas*, no instruction whatsoever was given to the jury by the presiding judge concerning the witness's invocation of his testimonial privilege against self-incrimination. It should also be noted that the witness's statement, in *Douglas*, bore on the fundamental part on the state's case against the defendant; and that the prosecutor did not conclude his reading of the statement and his asking questions of the witness until the full document had been read. Those facts are not present in the instant case.

Because *Douglas v. Alabama* is clearly distinguishable from the instant case as to facts, the court below has erred in applying *Douglas* to affirm the District Court's reversal of the State Appellate Court's decision.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Dated: March 16, 1967

JOHN W. BENOIT, JR.
Assistant Attorney General
Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the rules of the Supreme Court of the United States, the undersigned, counsel of record for the petitioner, on the date written below, did deposit a copy of the above petition for a writ of certiorari in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to respondent's attorney as follows: James R. Desmond, Esquire, 120 Exchange Street, Portland, Maine.
Dated: March 16, 1967

JOHN W. BENOIT, JR.
Assistant Attorney General
State House
Augusta, Maine

United States Court of Appeals
For the First Circuit

No. 6802.

ALLAN L. ROBBINS,
WARDEN, MAINE STATE PRISON,
RESPONDENT, APPELLANT,
v.
CLIFFORD G. SMALL, III,
PETITIONER, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before ALDRICH, *Chief Judge,*
MCENTEE and COFFIN, *Circuit Judges.*

John W. Benoit, Assistant Attorney General, with whom *Richard J. Dubord*, Attorney General, was on brief, for appellant.
James R. Desmond for appellee.

January 31, 1967.

MCENTEE, *Circuit Judge.* The only question raised by this appeal is whether petitioner Small's conviction for robbery in Maine Superior Court was obtained in violation of the Confrontation Clause of the Sixth Amendment. Basically, the answer depends on whether the prosecutor's conduct in the interrogation of a witness at the trial deprived petitioner of his right of cross-examination. On appeal from his conviction, Small contended that it did—but the Supreme Judicial Court of Maine decided otherwise and affirmed the conviction.[1] Petitioner now raises this

[1] A majority of the court held that no constitutional question was involved and that any prejudice Small may have suffered by reason of

same constitutional question in the instant habeas corpus proceeding and cites the leading case of *Douglas* v. *Alabama*, 380 U.S. 415 (1965) in support of his contention.

After hearing,[2] the district court found that the conduct complained of came within the principles set forth in *Douglas* and entered an order vacating petitioner's conviction and sentence.[3]

The essential facts are not in dispute. On the concluding day of petitioner's two day trial, the State called as its final witness an inmate of the state prison named Palmer, who had previously given the police a signed statement implicating the petitioner.[4] Early in the interrogation this witness claimed his Fifth Amendment privilege. Thereupon the prosecutor resorted to asking him a number of leading questions based on his signed statement which Palmer also refused to answer on self-incrimination grounds.[5] Despite the witness's repeated refusal the prosecutor continued to confront him with further detailed leading questions, also based on his statement, which the witness declined to

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the prosecutor's conduct was cured by the trial court's charge. *State* v. *Small* — Me. 219 A.2d 263 (1966), but see Chief Justice Williamson's dissenting opinion at page 269.

[2] The parties agreed that petitioner's right to habeas relief may be determined upon the record of the trial in the State Superior Court and on the opinions of the Supreme Judicial Court—thus obviating an evidentiary hearing.

[3] *Small* v. *Robbins*, 258 F.Supp. 621 (D.C. Me. 1966).

[4] It does not appear whether Palmer's confinement had any relation to the robbery but it does appear that he was questioned by police on the day of the robbery and made a statement.

[5] Although the prosecutor did not tell the jury what he was using as the basis for his leading questions, this could be readily inferred by them early in the questioning; particularly from two questions put to the witness after he first claimed the privilege, (1) did you make a statement to the Portland police on the day of the alleged robbery and (2) was it in connection with a case against Small. The witness refused to answer both questions. The record shows that the court and petitioner's counsel both knew that the prosecutor's reference was to the signed statement previously made to the police by this witness. They also knew its contents.

answer on the same grounds. In all, Palmer was asked and he refused to answer some fourteen such questions, which the prosecutor formulated from the witness's signed statement that he was holding in his hand while asking them. The inferences, particularly from the last six questions, were especially damaging to petitioner's case.[6] It is important to mention at this point that Palmer's statement was not admitted nor was it ever offered in evidence.

At the conclusion of Palmer's interrogation, petitioner's counsel requested that the jury be instructed *immediately*, not to consider any of these fourteen questions as evidence against his client but the trial judge denied this request on the ground that he would deal with this matter in his charge. Also, petitioner's subsequent motion for a mistrial was denied.[7] The trial judge, in the course of his charge, dealt at some length with the subject of the prosecutor's questions and the witness Palmer's refusal to answer them.[8]

In calling Palmer it would appear that the State was attempting to bolster its somewhat uncertain case against the petitioner. Up to that point in the trial the only significant testimony was that of the alleged robbery victim.

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[6] But they were allowed over the repeated objections of petitioner's counsel who had already unsuccessfully complained that the prosecutor by using these leading questions was "getting to the jury what he probably hoped this man's testimony would be." All fourteen questions may be found in the district court opinion and in the State court opinion, supra.

[7] He based this motion on the very pertinent ground that the prosecutor's questions "are so harmful and prejudicial that they can't possibly be cured by a charge."

[8] He very carefully instructed the jury that Palmer was clearly within his rights in invoking his Fifth Amendment privilege; that he gave no evidence beyond stating his name, his present and former address and that he knew Small; that they were not to draw any inferences from anything Palmer did not say nor speculate on what his answers might have been if he had chosen not to invoke the privilege; and finally, that they were not to draw any inferences from the prosecutor's questions.

He identified the petitioner as the man who assaulted him and testified that immediately thereafter, when he regained his composure, he discovered that eighty dollars was missing from his pants pocket. But he did not testify nor was there any evidence in the case that this petitioner took the money.

On the basis of Palmer's signed statement the prosecutor had reason to believe that this witness would supply the much needed evidence on this element of the crime. When Palmer invoked the privilege the prosecutor immediately sought to accomplish the same result, not by admissible evidence, but through impermissible inferences from his own leading questions.[9] The fourteen questions, if answered in the affirmative, would have furnished evidence on practically every essential element of the crime. Thus, as in *Douglas*, they "clearly bore on a fundamental part of the State's case against petitioner" and "formed a crucial link in the proof." *Douglas* v. *Alabama, supra* at 419 and 420.

When it became apparent to the prosecutor that this witness was broadly claiming the privilege,[10] basic fairness

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[9] Among the questions he put to Palmer were these four:

"I ask you, down in the Forest City Diner shortly after you left Mr. Small off uptown, did he give you some money?"

"Did he give you some money down there?"

"Did Mr. Small tell you he got $80 or $40?"

"Which one of you went over to the cashier and had a bill broken, down at the Forest City Diner?"

Although upon objection the last two were withdrawn, obviously this essential but previously lacking direct "evidence" of robbery was indirectly presented to the jury via these repeated questions.

[10] Chief Justice Williamson points out that this should have become apparent to him early in the interrogation when the witness refused to answer whether he had made a statement to the police and no later than when he refused to answer the next question as to whether this statement was in connection with a case against Small. In any event, from the witness's previous refusals this must have been conclusively apparent to the prosecutor before he asked the last six questions.

required that he discontinue his leading questions. Yet he persisted with at least six even more damaging ones, which by this time he knew or certainly should have known the witness would not answer.[11] But that is only part of it. The trial court's ruling permitting the prosecutor's leading questions involved more than just an exercise of the court's discretion, as the State contends. It cut much deeper. The prosecutor, through these repeated questions, indirectly but effectively brought to the jury's attention the substance of a statement that was not in evidence and, therefore, not subject to cross-examination. This deprived the petitioner of a fundamental right secured by the Confrontation Clause of the Sixth Amendment—recently made applicable to the states. *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Douglas* v. *Alabama, supra.* The prosecutor not being a witness, the inference that the statement he was holding in his hand was Palmer's could not be tested by cross-examination. Palmer could not be cross-examined upon a statement imputed to but not admitted by him. Furthermore, as in *Douglas* at 420 "the inferences from [the] witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant."

The only remaining question is whether this prejudice was cured by the court's charge. We think not. It is true that this is not a case like *Fletcher* v. *United States,* 332 F.2d 724, 727 (D.C. Cir. 1964), where the instruction "left the situation much in doubt."[12] Nor is it one where the

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[11] The fact that the prosecutor did not originally know that the witness intended to claim the privilege does not excuse his subsequent conduct nor is it of any consequence that in asking the questions he was not improperly motivated. The resulting prejudice was the same.

[12] The trial court's charge, particularly on the issues raised by the witness Palmer's refusal to answer, was clear and forceful. The court stated "You will not, I instruct you with as much emphasis as I am capable, undertake to speculate upon what might have been his [Palmer's] answers had he chose not to invoke the constitutionally guaranteed privilege against self-incrimination . . . ." See also n. 8.

prejudice inherent in the denial of the right of cross-examination constituted only a "minor lapse"—later cured by the charge. *United States* v. *Hiss*, 185 F.2d 822, 832 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951). In the instant case the error is substantial and the resulting prejudice extreme. Here the jury was subjected to the sustained impact of a series of repeated, leading questions with no cautionary admonition from the court until the very end of the trial. Although the charge was a forceful one, the inferences already firmly implanted in the minds of the jurors could not thereby be erased. Where, as here, the inferences from the witness's refusal to answer added critical weight to the State's case, in a form not subject to cross-examination, in our opinion the error is such that it cannot be cured by the court's subsequent charge—however forceful this charge may be.

The State vigorously contends that *Namet* v. *United States*, 373 U.S. 179 (1963), affirming our opinion in 301 F.2d 314 (1st Cir. 1962), and the recent case of *United States* v. *Reincke*, 354 F.2d 418 (2d Cir. 1965), *cert. denied*, 384 U.S. 993 (1966), are more in point here than *Douglas*. In *Namet* only evidentiary trial error was involved. No constitutional question was presented. In addition, the few relatively insignificant claims of privilege in that case were at most only cumulative support for an inference that was already well established by the non-privileged portion of the witness's testimony. Thus, *Namet* is not like the instant case where Palmer's refusal to testify was the only source of the unfavorable inference against the defendant. Finally, it should be mentioned that the defendant in *Namet* not only failed to object to the prosecutor's activity but at times appeared to acquiese in it and attempted to use it to his advantage.

We are frank to say that we cannot accept either the reasoning or the result reached by the court in *Reincke*.

The assertion in *Reincke* that the defendant might have established by cross-examination that the confession was coerced does not go far enough. A confession given unwillingly may nevertheless be true. On the basic issue of truth no cross-examination could have been had either in *Reincke,* or in the instant case, where the witness claimed his constitutional privilege. Furthermore, for reasons already stated, we cannot agree with the court in *Reincke* that *Douglas* v. *Alabama* is also distinguishable on the ground that *Namet* "appears to indicate that any prejudice that might result from such an examination can be cured by cautionary instructions to the jury." In any event, the effect of the prosecutor's improper questioning in the instant case seems to us more substantial than it was in *Reincke.*

We would be closing our eyes to reality were we to find that the court's charge cured the prejudice that resulted to the petitioner under the circumstances here. In view of the large number of leading questions asked, the relevance of proving petitioner's possession of money on the day in question and the importance of this final witness generally to the State's proof in this relatively short trial, we cannot say that the jury did not give some weight to the impermissible inferences raised by the witness's refusal to answer the prosecutor's questions.

In our opinion this case comes within the ambit of *Douglas* v. *Alabama, supra* and with due respect to the State court we hold that the principles laid down in *Douglas* were violated here.

Affirmed.